Kondapuram Raghuram v Soo Peng @ Yew Soo Peng

HIGH COURT (KUALA LUMPUR) — ORIGINATING PETITION NO D5–26–70 OF 2004
RAMLY ALI J
9 SEPTEMBER 2005

Civil Procedure — Striking out — Petition under section 181 of the Companies Act 1965 — Application under O18, r 19(1)(a), (b), (d) and O 92 r 4 of the Rules of the High Court 1980 — Petitioner alleged that he was the actual beneficial owner of the shares in the company — Whether petitioner has concealed his 'true' alleged ownership in the shares of the Company with a view to deceiving the authorities or government linked companies as to the true ownership of the Company — Whether petition allegation tainted with illegality and is contrary to public policy — Section 24(e) of the Contracts Act 1950 — Whether allegations of petitioners obviously unsustainable — Whether 3rd and 4th respondents respectively who are merely employees of the Company been wrongly cited as respondents to the petition

The petition was filed by the petitioner under s 181 of the Companies Act 1965 ('the Act') against all the respondents. The petitioner is an individual. The petitioner claimed to be the legal and beneficial owner of 200,000 shares in the fifth respondent, Tetracon Engineering Sdn Bhd ('the Company') representing 10% of the issued and paid-up capital of the Company. The first respondent is the legal and beneficial owner of 200,001 shares representing 10% of the issued and paid-up capital of the Company. The second respondent is the registered owner of 1,600,000 shares representing 80% of the issued and paid-up capital of the Company. The petitioner contended that the second respondent is holding 792,500 shares representing 39.62% of the issued and paid up capital of the Company for the benefit of the petitioner. The third respondent is the son of the first respondent and is holding the position of Business Development Manager with the Company. The fourth respondent is the son-in-law of the first respondent and is holding the position of Electrical Manager with the Company. The petitioner presented the petition on the strength of his existing shareholding in the Company and the petitioner's cause of action was premised on the conduct of the respondents in the management and control of the Company. As regards to the third and fourth respondents, they were brought in on their alleged conduct in the management and control of the Company as well as their role in the oppressive acts brought to bear upon the petitioner. The first to the fourth respondents had filed an application to strike out the petition under O18, r 19(1)(a), (b), (d) and O 92 r 4 of the Rules of the High Court 1980 ('RHC'). The main grounds for the application to strike out the petition were that if the petitioner's allegations that he was the actual beneficial owner of the shares in the Company were true, then the petitioner has concealed his 'true' alleged ownership in the shares of the Company with a view to deceiving the authorities or government linked companies as to the true ownership of the Company, and as such, the basis which the petitioner has presented the petition is

tainted with illegality and is contrary to public policy. With regards to the third and fourth respondents, there was an additional ground that the third and fourth respondents respectively are merely employees of the Company and as such they have been wrongly cited as respondents to the petitioner.

Held, allowing the application:

(1) Relief under s 181 of the Act should be granted where the petitioner can show that the respondents were in control of the Company and were exercising that control in the affairs of the Company in a manner which was oppressive to the petitioner. In appropriate cases, an employee of the company who is responsible for any act which amounts to an act of the company may be cited as respondent in a petition, under s 181 depending under which limb the petitioner relies on his case (see para 17).

(2) Section 181 of the Act can be invoked against any oppression, whether or not that the oppressor is a director or has a controlling interest in the company. The wordings of s 181 conferred the widest jurisdiction on the court as regards parties against whom relief could be sought (see *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420, *Lowe v Fahey* [1996] 1 BCLC 262, *Re a Company* [1986] BCLC 68 applied. The wordings of s 181 envisage that a petition can be directed against any person who is involved in the affairs of the company or involved in some act of the company in a manner oppressive or which unfairly discriminates or prejudicial to the members, shareholders of debenture holders, not necessary against the directors or shareholders only (see para 21, 22 & 26).

(3) The status of the third and fourth respondents and the manner in which they conduct themselves and the affairs of the company were serious issues to be tried. Unless the third and fourth respondents were called to explain their conduct the allegations made by the petitioner stands unchallenged. The allegations were serious and involve the management of the financial affairs of the Company. Therefore, there was clearly a need for the third and fourth respondents to be made party to the petition, if at all, the petition was to proceed (see para 30).

(4) What the petitioner sought in his petition was inter alia, for the court's sanction and the giving effect of his purported scheme elaborately designed to deceive the licensing board and ultimately the government and the quasi-government bodies according to the Company an untrue 'bumiputra' status company, thus enabling the Company opportunity to secure the special contracts. The petitioner's act was designed to circumvent the New Economic Policy where bumiputra participation in businesses is in line with. This tantamount to an improper act and certainly one which was contrary to public policy. Section 24(e) of the Contracts Act 1950 states that the consideration or object of an agreement is lawful unless the Court regards it as immoral or opposed to public policy. The petitioner's claims were unenforceable and the Court should not be used to facilitate the petitioner's claims (see para 31).

(5) The petitioner's purported scheme of parking his shares with the second respondent has the effect of avoiding the New Economic Policy at the very outset. This scheme controverses the purpose and intention of the New Economic Policy. Hence, so long as the scheme concerned has the effect of defeating statutes or laws and policies of Malaysia, the scheme and any agreements thereunder would be illegal and unenforceable (*see Harun bin Taib v Khor Peng Song* [1991] 3 CLJ 2484) applied. The petition was an abuse of process (see para 36).

(6) This was a plain and obvious case that the petitioner has no chance of success based on his own assertion of fact. The fact was clear and undisputed. The issue of law particularly with respect to s 24(e) of the Contracts Act 1950 was unarguable and unsustainable. Therefore, the Court allowed the respondents' application to strike out the petition (see para 49).

[Bahasa Malaysia summary

Pempetisyen memfailkan petisyen di bawah s 181 Akta Syarikat 1965 ("Akta tersebut") terhadap kesemua responden-responden. Pempetisyen adalah seorang individu. Pempetisyen mendakwa bahawa beliau adalah tuanpunya sah disisi undang-undang dan juga tuan punya benefisial 200,000 saham-saham responden kelima, Tetracon Engineering Sdn Bhd ("Syarikat tersebut") yang mewakili 10% dari modal keluaran dan berbayar Syarikat tersebut. Responden pertama adalah tuanpunya sah disisi undang-undang dan tuanpunya benefisial 200,001 saham-saham yang mewakili 10% dari modal sah dan berbayar Syarikat tersebut. Responden kedua adalah tuanpunya sah disisi undang-undang dan tuanpunya benefisial 1,600,000 saham-saham yang mewakili 80% dari modal sah dan berbayar Syarikat tersebut. Pempetisyen mendakwa bahawa responden kedua memegang 792,500 saham-saham yang mewakili 39.62% dari modal sah dan berbayar Syarikat tersebut bagi pihak pempetisyen. Responden ketiga adalah anak lelaki kepada responden pertama dan memegang jawatan Pengurus Pembangunan Perniagaan di dalam Syarikat tersebut. Responden keempat adalah menantu lelaki kepada responden pertama dan memegang jawatan Pengurus Elekrikal di dalam Syarikat tersebut. Pempetisyen membawa petisyen ini sebagai pemegang saham semasa Syarikat tersebut dan kausa tindakan pempetisyen adalah berkenaan perlakuan responden-responden berhubung dengan pengurusan dan kawalan Syarikat tersebut. Berhubung dengan responden ketiga dan keempat, tindakan terhadap mereka adalah berasaskan dakwaan mengenai perlakuan mereka di dalam pengurusan dan kawalan Syarikat tersebut dan juga peranan mereka di dalam perbuatan-perbuatan menindas ke atas pempetiyen. Responden pertama hingga responden keempat telah memfailkan permohonan untuk membatalkan petisyen tersebut di bawah A 8, k 19(1)(a), (b), (d) dan A 92 k 4 Kaedah-kaedah Mahkamah Tinggi ("KMT"). Alasan-alasan utama permohonan untuk membatalkan petisyen tersebut adalah jika dakwaan-dakwaan pempetisyen yang beliau adalah pemilik benefisial sebenar saham-saham Syarikat tersebut adalah benar, maka pempetisyen telah menyembunyikan pemilikan 'sebenarnya' saham-saham di dalam Syarikat tersebut dengan tujuan untuk menipu pihak-pihak berkuasa atau syarikat-syarikat berkaitan kerajaan, dan dengan itu, asas petisyen yang dibawa oleh pempetisyen tercemar dengan kepenyalahan undang-undang dan adalah bercanggah dengan polisi awam.

A Berhubung dengan responden ketiga dan keempat, terdapat alasan tambahan yang bahawa responden ketiga dan keempat masing-masingnya adalah pekerja Syarikat tersebut dan dari itu mereka telah tersilap disebut sebagai responden-responden oleh pempetisyen.

B

Diputuskan, membenarkan permohonan:

(1) Relief dibawah s 181 Akta tersebut wajar diberikan apabila pempetisyen dapat menunjukkan bahawa responden-responden mengawal Syarikat tersebut dan mereka menggunakan kuasa tersebut dalam mengendalikan perkara-perkara
C Syarikat yang mana ianya menindas pempetisyen. Dalam kes yang sesuai, seseorang pekerja syarikat yang bertanggungjawab untuk sebarang perbuatan yang menjadi satu perbuatan syarikat boleh dinamakan sebagai seorang responden di dalam sesuatu petisyen, di bawah s 181 bergantung kepada bahagian mana pempetisyen menyandarkan kesnya (lihat perenggan 17).

D (2) Seksyen 181 Akta tersebut boleh digunakan terhadap sebarang penindasan, samada penindas adalah seorang pengarah atau seorang yang mempunyai kepentingan yang mengawal syarikat. Perkataan-perkataan yang digunapakai di dalam s 181 memberikan bidangkuasa yang teramat luas kepada Mahkamah berhubung dengan pihak yang mana relief ini dituntut: *Re Little Olympian*
E *Each-Ways Ltd* [1994] 2 BCLC 420; *Lowe v Fahey* [1996] 1 BCLC 262; *Re a Company* [1986] BCLC 68, [1986] 1 WLR 281 terpakai. Perkataan-perkataan yang digunakan di dalam s 181 menjangka sesuatu petisyen boleh dibawa terhadap mana-mana orang yang terlibat dengan perkara-perkara syarikat atau yang terlibat dengan mana-mana perbuatan syarikat yang menindas atau yang secara adil mendiskriminasikan atau yang memprejudiskan ahli-ahlinya,
F pemegang-pemegang saham pemegang debentur, tidak semestinya terhadap pengarah-pengarah atau pemegang-pemegang saham sahaja (lihat perenggan 21, 22 & 26).

(3) Status responden ketiga dan keempat dan cara mereka mengendalikan diri mereka dan perkara-perkara syarikat adalah isu-isu yang serius yang perlu
G dibicarakan. Melainkan jika responden ketiga dan keempat dipanggil untuk menerangkan perlakuan, dakwaan-dakwaan yang dibuat oleh pempetisyen kekal tak tersangkal. Dakwaan-dakwaan tersebut serius dan melibatkan pengurusan perkara-perkara kewangan Syarikat tersebut. Olehyang demikian, adalah jelas terdapat satu keperluan untuk responden ketiga dan keempat
H dijadikan pihak kepada Petisyen tersebut, jika petisyen tersebut ingin diteruskan (lihat perenggan 30).

(4) Apa yang dituntut oleh pempetisyen di dalam petisyennya antara lainnya, bagi Mahkamah memberi sanksi dan menguatkuasakan skim yang direka oleh pempetisyen untuk menipu badan perlesenan dan kerajaan dan badan separa
I kerajaan bagi memberikan status 'bumiputra' kepada Syarikat tersebut, maka ianya akan membolehkan Syarikat tersebut berpeluang untuk mendapat kontrak-kontrak khas. Perbuatan pempetisyen direka untuk mengelak Polisi Ekonomi Baru dimana penyertaan bumiputra di dalam perniagaan sejajar dengannya. Ini adalah satu perbuatan yang tidak wajar dan semestinya merupakan satu perbuatan yang bertentangan dengan polisi awam.

Seksyen 24(e) Akta Kontrak menyatakan bahawa balasan atau objek sesuatu perjanjian adalah sah di sisi undang-undang melainkan jika mahkamah menganggapnya tiak bermoral atau berlawanan dengan polisi awam. Tuntutan-tuntutan pempetisyen tidak boleh dikuatkuasakan dan mahkamah tidak wajar digunakan untuk memudahkan tuntutan-tuntutan pempetisyen (lihat perenggan 31).

(5) Skim pempetisyen meletakkan saham-sahamnya dengan responden kedua memberi kesan mengelak dari Polisi Ekonomi Baru. Skim ini bertentangan dengan tujuan dan niat Polisi Ekonomi Baru. Dari itu, selagi skim tersebut mempunyai kesan mengelak kanun atau undang-undang dan polisi-polisi Malaysia, skim tersebut dan sebarang perjanjian-perjanjian yang dibuat dibawahnya adalah tidak sah di sisi undang-undang dan tidak boleh dikuatkuasakan: *Harun bin Talb v Khor Peng Song* [1991] 3 CLJ 2484 terpakai. Petisyen ini adalah satu penyalahgunaan proses (lihat perenggan 36).

(6) Ini adalah satu kes yang jelas dan nyata pempetisyen tidak mempunyai sebarang peluang untuk berjaya, berdasarkan fakta-fakta yang dikemukakan oleh dirinya sendiri. Fakta-fakta adalah jelas dan tidak dipertikaikan. Isu undang-undang terutama yang berhubung dengan seksyen 24(e) Akta Kontrak 1950 tidak boleh dipertikaikan dan berdiri. Oleh yang demikian, mahkamah membenarkan permohonan responden-responden membatalkan petisyen tersebut (lihat perenggan 49).]

Notes

For cases on petition under section 181 Companies Act 1965, see 2 *Mallal's Digest* (4th Ed, Consolidated Subject Index and Table of Cases) paras 5996–6002.

Cases referred to

Bonder Builder Sdn Bhd v United Malayan Banking Corporation Bhd [1993] 3 MLJ 37 (refd)

B-Trak Sdn Bhd v Bingkal Timber Agencies Sdn Bhd [1989] 1 MLJ 124 (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457 (refd)

Lowe v Fahey [1996] 1 BCLC 262 (refd)

Mustafa bin Osman v Lee Chua & Anor [1996] 2 MLJ 141 (refd)

Palaniappa Chettiar v Arunasalam Chettiar [1962] 28 MLJ 143 (refd)

Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd & Ors [1996] 1 MLJ 309 (refd)

Re a Company [1986] BCLC 68 (refd)

Re Little Olympian Each-Ways Ltd [1994] 2 BCLC 420 (refd)

Suntoso Jacob v Kong Miau Ming [1986] 2 MLJ 170 (refd)

Wong Yoon Chai v Lee Ah Chin [1981] 1 MLJ 219 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d)
Companes Act 1965 s 181
English Companies Act 1985 ss 459, 461(1)
Contracts Act 1950 ss 24, 66

Chetan Jethwani (Sri Ram & Co) for the petitioner.
Jayne Koe (Cheah Teh & Su) for the respondents.

Ramly Ali J:

THE PETITION

[1] The present petition filed by the petitioner under s 181 of the Companies Act 1965 against all the respondents for the following orders namely:

(1) that an independent auditor be appointed to investigate and audit the accounts of the fifth respondent company from 1995 to the date of the order to be made herein at the expense of the fifth respondent;

(2) that the first respondent and the second respondent be made to pay the fifth respondent company all sums found to be due and owing from themselves, if any, upon that independent auditor concluding his investigation, which sums will include all sums unaccounted for;

(3) that the first respondent and/or the second respondent be ordered to pay such interest on the sums found to be due and owing to the fifth respondent company at such rate and for such period as this court deems fit;

(4) a declaration that the second respondent is holding 792,500 shares in the fifth respondent company on trust for the petitioner;

(5) that the second respondent be ordered to transfer the 792,500 shares of the fifth respondent company being held by him back to the petitioner;

(6) a declaration that the resolutions passed at the January 2003 meeting and all subsequent meetings thereafter are void, unlawful and of no effect;

(7) an order that the first respondent and the second respondent be restrained, whether by themselves, or their agents and/or servants from carrying out, enforcing or otherwise giving effect to the resolutions, passed at the January 2003 meeting and all subsequent meetings thereafter;

(8) an order that the first respondent, the second respondent and/or the fifth respondent company be restrained from passing any resolutions without the unanimous consent of the petitioner, Yew Soo Peng and Megat Nordin;

(9) that the first respondent, second respondent, third respondent and/or fourth respondent be held liable for any damages suffered by the fifth respondent company;

(10) that the parties be at liberty to apply to this court for any relief that may be necessary to carry on the day to day operations of the fifth respondent company;

(11) such further or other orders or directions be made or given under s 181(2) of the Companies Act 1965 with a view to bringing to an end or remedying the matters complained of;

(12) the costs of this petition; and

(13) such further and other order as this court may deem fit.

THE PARTIES

[2] The petitioner is an individual with an address for service at No 2 Gerbang Ampang Hilir, 55000 Ampang, Selangor Darul Ehsan. The petitioner claimed to be the legal and beneficial owner of 200,000 shares in the fifth respondent, Tetracon Engineering Sdn Bhd. ('the company') representing 10% of the issued and paid-up capital of the company.

[3] The first respondent is the legal and beneficial owner of 200,001 shares representing 10% of the issued and paid-up capital of the company.

[4] The second respondent is the registered owner of 1,600,000 shares representing 80% of the issued and paid-up capital of the company. The petitioner contends that the second respondent is holding 792,500 shares representing 39.62% of the issued and paid up capital of the company for the benefit of the petitioner.

[5] The third respondent is the son of the first respondent and is holding the position of Business Development Manager with the company.

[6] The fourth respondent is the son-in-law of the first respondent and is holding the position of Electrical Manager with the company.

THE COMPANY (FIFTH RESPONDENT)

[7] The company was incorporated on 27 May 1982 under the provisions of the Companies Act 1965 as Tetracon Engineering Sdn Bhd. The registered address of the company as at the date of filing of this petition is Suite 13.0, 13th Floor, Wisma SPK, 50250 Kuala Lumpur.

[8] The company has an authorised share capital of RM10,000,000 divided into 10,000,000 shares of RM1 each. At present the company has issued 2,000,001 shares which are fully paid up or credited as having been fully paid up.

[9] The company was incorporated for the purpose of carrying out and providing engineering and manufacturing services to various industries including the oil and gas and utilities sectors. Since its incorporation, the company has provided its engineering services to *inter alia* Tenaga Nasional Bhd, Petrolium Nasional Berhad, Electricity Generating Authority of Thailand, Bharat Heavy Electrics Ltd, DRB Hicom and the Public Utilities Board of Singapore.

[10] The petitioner presented the petition on the strength of his existing shareholding in the company and the petitioner's cause of action is premised on the conduct of the respondents in the management and control of the company. As

regards to the third and fourth respondents, they were brought in on their alleged conduct in the management and control of the fifth respondent company as well as their role in the oppressive acts brought to bear upon the petitioner.

RESPONDENTS' APPLICATION TO STRIKE OUT PETITION

[11] The first to the fourth respondents had filed in their applications (encl 9 and 10) to strike out the petition under O 18 r 19(1)(a), (b), (d) and O 92 r 4 of the Rules of the High Court 1980 (RHC) on the following grounds:

(a) The petitioner does not have a cause of action in the proceedings herein specifically against the third and fourth respondents because as admitted by the petitioner in his own petition, the third and fourth respondents are mere employees of the company;

(b) If the petitioner's allegations that the second respondent was holding the shares on his behalf, are true (which are denied), he has concealed his 'true' alleged ownership in the shares of the company with a view to deceiving the authorities and/or government linked companies as to the true ownership of the company;

(c) The basis on which the petitioner has presented this petition is tainted with illegality and is contrary to public policy and as such, the petitioner should not be entitled to the reliefs sought in his petition;

(d) The petitioner does not have a valid cause of action;

(e) The petition herein is scandalous, frivolous or vexatious or is an abuse of the process of the court.

FINDINGS OF THE COURT

[12] The main grounds for the application to strike and the petition cited by the respondents are that if the petitioner's allegations that he is the actual beneficial owner of the shares in the company are true, then the petitioner has concealed his 'true' alleged ownership in the shares of the company with a view to deceiving the authorities or government linked companies as to the true ownership of the company, and as such, the basis which the petitioner has presented the petition is tainted with illegality and is contrary to public policy and thus the petitioner should not be entitled to the relief sought in his petition.

[13] These grounds apply to both applications under encl 9 and 10 for all the first to fourth respondents. With regard to the third and fourth respondents, there is an additional ground to support this application to strike out the petition (encl 9) ie that the third and fourth respondents respectively are merely employees of the company and as such they have been wrongly cited as respondents to the petitioner.

[14] The court shall first deal with the additional ground (in respect of the third and fourth respondents) ie that the third and fourth respondents have been wrongly cited as respondents to the petition as being mere employees of the company.

THIRD AND FOURTH RESPONDENTS - WRONGLY CITED AS RESPONDENTS

[15] It is not disputed that the third and fourth respondents are not shareholders of the company. They are also not the directors of the company at all material times. The third respondent is the son of the first respondent and is holding the position of Business Development Manager with the company. The fourth respondent is the son-in-law of the first respondent and is holding the position of Electrical Manager with the company.

[16] The respondents claimed that any petition under s 181 of the Companies Act 1965 (as in the present case) can only be directed against the director or shareholder who are in the position to control the affairs or direction of the company, and not intended to apply to employees who are carrying out the instructions of the directors. Therefore, the respondents concluded that both the third and fourth respondents were wrongly joined as respondents and they should be allowed to strike out the petition against them or at least to have themselves struck out as respondents.

[17] The court cannot agree with the respondent's proposition that a petition under s 181 of the Companies Act 1965 can only be directed on either the directors or shareholders of the company. Such a construction of the powers conferred by s 181 would unduly curtail and limit the powers granted by statute to provide relief against oppression. Relief under s 181 should be granted where the petitioner can show that the respondents are in control of the company and are exercising that control in the affairs of the company in a manner which is oppressive to the petitioner. For the sake of clarity, the provisions of s 181(1) of the Companies Act 1965 is reproduced below:

(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the court for an order under this section on the ground:

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

[18] Under s 181(1)(a), two situations can arise to be grounds for a petition, namely:

(i) that the affairs of the company are being conducted in a manner oppressive or in disregard of the interest of members, shareholders or holders of debenture of the company and

(ii) that the powers of the directors are being exercised in a manner oppressive or in disregard of the interest of members, shareholders or holders of debenture.

[19] A petition can be instituted and directed under either one or both of the grounds above. For the first ground, a petition can be directed against any person who has an effective control in the affairs and direction of the company. That person can be a member, shareholder, director or any other person or third party who effectively has some control in the affairs and direction of the company (including employees of the company). The second ground is only directed to directors of the company who exercise their powers in a manner oppressive or in disregard of the interest of members, shareholders or holders of debenture.

[20] Under s 181(1)(b), the grounds for a petition relate to either one of the followings namely:

(a) that some act has been done… which unfairly discriminates against or prejudicial to the members or holders of debentures of the company; and

(b) that some resolution of the members, holders of debentures or any class has been passed… which unfairly discriminates against or prejudicial to the members or holders of debentures of the company.

[21] Ground (b) above only refers to some resolution of members or debenture holders. However, ground (a) on the other hand is applicable to 'some act of the company'. Acts of a company relate to the act of the directors as well as the act of those in the employment of the company (especially in the top management level). In the appropriate case, an act of an employee may be considered as an act of the company. Therefore, in the appropriate case, an employee of the company who is responsible for any act which amounts to an act of the company may be cited as respondent in a petition under s 181 depending under which limb the petitioner relies his case. Section 181 of the Companies Act 1965 can be invoked against any oppression, whether or not that the oppressor is a director or has a controlling interest in the company.

[22] The wordings of s 181 conferred the widest jurisdiction on the court as regards parties against whom relief could be sought. There are sufficient authorities to support the above findings. In *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420, the petitioner was seeking relief for alleged unfairly prejudicial conduct under s 459 and s 461 of the English Companies Act 1985 (analogous to relief under s 181 of our Companies Act 1965). The court in that case allowed an application to add a company as a respondent to the petition notwithstanding that the proposed respondent company was neither a shareholder of the company involved in the dispute nor were the alleged acts of prejudicial conduct diverted at the proposed respondent company. Needless to say, the proposed respondent company was not a director of the company involved in the dispute. The test applied in that case was whether or not the relief sought could affect the proposed respondent company.

[23] In that case (*Re Little Olympian Each-Ways (Ltd)*, Lindsay J held: A

> The impression given both in the sections and in the rules is that the greatest possible flexibility was intended by the legislature to be given to the Courts. Thus s 459 does not, for example, require that it is by a Respondent or by the Respondents to the Petition that the company's affairs are being or have been conducted in the manner complained of. It does not require that the Respondent to the Petition should be limited to members of the company or to its directors or to those conducting its affairs… B

[24] In another case, *Lowe v Fahey* [1996] 1 BCLC 262, it was held by Charles Aldous QC that C

> Section 461(1) of the 1985 Act conferred a very wide jurisdiction on the Court and, therefore, where the unfairly prejudicial conduct alleged involved the diversion of company funds, a Petitioner was entitled as a matter of jurisdiction to seek an order under s 461 for payment to the company itself not only against members, former members or directors allegedly involved in the unlawful diversion, but also against third parties who had knowingly received or improperly assisted in the wrongful diversion. D

[25] In *Re a Company* [1986] BCLC 68, the petitioner sought relief against one 'H', a former director and shareholder, who prior to presentation of the petition had disposed of his shares to a Gibraltarian company. The allegations of unfairly prejudicial conduct included payment by H of improper management fees as well as other allegations of breach of fiduciary duties. The relief sought under s 461 included not only an order that H and the Gibraltarian company purchase the petitioner's shares but also that H account to the company for the payments improperly made. Hoffmann J refused H's application to have any part of the petition struck out against him. E F

[26] Based on the above authorities the court is fully satisfied that the language of s 181 of the Companies Act 1965 conferred wide jurisdiction on the court as regards parties against whom relief could be sought. The wordings of s 181 as discussed above, clearly envisage that a petition can be directed against any person who is involved in the affairs of the company or involved in some act of the company in a manner oppressive or which unfairly discriminates or prejudicial to the members, shareholders of debenture holders, not necessarily against the directors or shareholders only. In *Re Little Olympian Each-Ways Ltd*, it was stressed by Lindsay J that G H

> In an appropriate case, relief can be sought against a non-member, or against a person not involved in the conduct complained of (at least if that person could be affected by the relief sought), and in appropriate cases a person could be made a Respondent eventhough no relief was sought against that person. However, the Court could strike out a Petition, even against a person who had been involved in the allegedly unfairly prejudicial conduct, if no remedy was sought against that person. There may be circumstances where the prospects of an order being made were perfectly hopeless and hence where it would be an abusive use of the process to require the Respondent to remain as such or to be added as such. I

[27] The court shall also apply the test of whether or not the relief sought in a particular petition would affect the respondents in question (ie the third and fourth respondent in the present petition). This test was applied in *Re Little Olympian Each-Ways Ltd and Re a Company.*

[28] In the present petition, the petitioners have prayed inter alia, that the third and fourth respondents be held liable for any damages suffered by the company. Section 181(2) of the Companies Act 1965empowers the court with a view to bringing to an end or remedying the matters complained of, 'make such order as it thinks fit'. In other words, the court is empowered to entertain claim for damages by the petitioner against the third and fourth respondents. If the petition is allowed, the third and fourth respondents will obviously be affected by the order.

[29] This proposition is supported by Lindsay J in *Re Little Olympians Each-Ways Ltd*, when after reviewing the relevant authorities, His Lordship concluded that as a matter of jurisdiction the language of s 461(1) of the English Companies Act 1985, which states that the court 'may make such order as it thinks fit for giving relief in respect of the matters complained of' confers a very wide jurisdiction. This ruling was agreed by Charles Aldous QC in *Lowe v Fahey.*

[30] In the present case the petitioner is alleging that the third and fourth respondents by virtue of their relationship to the firsth respondent (son and son-in-law) and their positions in the company in top management posts are exercising control over the affairs of the company eventhough they are not the directors of the company. Clearly the status of the third and fourth respondents and the manner in which they conduct themselves and the affairs of the company are serious issues to be tried. Unless the third and fourth respondents are called to explain their conduct the allegations made by the petitioner stands unchallenged. The allegations are serious and involve the management of the financial affairs of the company. Therefore, there is clearly a need for the third and fourth respondents to be made party to the present petition, if at all, the petition is to proceed.

ILLEGALITY AND CONTRARY TO PUBLIC POLICY

[31] The respondents are alleging that the petition is tainted with illegality and against the public policy in the sense that the petitioner in parking his shares in the company with the second respondent (as alleged by him in the petition) was trying to deceive the licensing board, namely the Pusat Khidmat Kontraktor and ultimately the government into the company an untrue 'bumiputra status' company, thus enabling the company opportunity to secure special contracts. This, the respondents claimed was designed to circumvent the New Economic Policy where bumiputra participation in businesses is in line with.

[32] At paras 23 to 28 of the petition, the petitioner claims as follows (as summarised):

(a) The first and second respondents and the petitioner wanted to convert the company into a bumiputra status company.

(b) To qualify as a bumiputra status company, 80% of the issued and paid up capital of the company would have to be registered in the name of a bumiputra.

(c) The petitioner claims that the scheme was to transfer his remaining 29% interest in the company to the second respondent to facilitate the company application for bumiputra status.

(d) In 1994, it was apparently decided that the company should upgrade its construction licence with Pusat Khidmat Kontraktor from a Class C licence to Class A licence. The purpose of this upgrading was to enable the company to compete for contracts which were of higher value.

(e) In order to qualify for the Class A licence, the company had to increase its issued and paid up capital by RM300,000 to RM400,000.

(f) At the same time, it was decided that the company should also increase its authorised share capital from RM500,000 to RM10,000,000.

(g) The petitioner claims that in order to maintain the pre-existing bumiputra shareholding, it was apparently decided that the registered shareholding in the company would be structured as follows:

(i) The second respondent: 80%

(ii) The first respondent: 10%

(iii) The petitioner: 10%

(h) The petitioner claims in his petition that the second respondent is actually holding shares in trust for the petitioner.

[33] In other words, assuming what the petitioner alleged is true, the parking of the shares by the petitioner with the second respondent is merely designed to obtain the bumiputra status of the company so as to enable the company to secure special status as a 'bumiputra' company. Parties do not deny that a 'bumiputra' status company has certain privileges in securing contracts for works from the government and quasi-goverment institutions. These privileges are restricted for true 'bumiputra' status companies only.

[34] What the petitioner seeks from this court in his petition is inter alia, for the court's sanction and the giving effect of his purported scheme elaborately designed to deceive the licensing board, namely the Pusat Khidmat Kontraktor and ultimately the government and the quasi-government bodies into the company an untrue 'bumiputra' status company, thus enabling the company opportunity to secure the special contracts. The petitioner's act is designed to circumvent the New Economic Policy where bumiputra participation in businesses is in line with. This tantamount to an improper act and certainly is one which is contrary to public policy. Section 24(e) of the Contracts Act 1950 states very clearly that 'the consideration or object of an agreement is lawful unless… (e) the court regards it as immoral or opposed to public policy'.

[35] Hence, every agreement of which the object or consideration is unlawful is void. Hence, the petitioner's claims are unenforceable and this court should not be used to facilitate the petitioner's claims any further.

[36] The petitioner's purported scheme of parking his shares with the second respondent has the effect of avoiding the New Economic Policy at the very outset. This scheme controverses the purpose and intention of the New Economic Policy. Hence, so long as the scheme concerned has the effect of defeating statutes or laws and policies of Malaysia, the scheme and any agreements thereunder would be illegal and unenforceable. It is trite that no court will lend its aid to a man who found his cause of action upon an illegal act (intended or otherwise). Such a cause of action cannot be maintained and no claim or recovery pursuant thereto would be allowed. This ground alone will justify the petition be struck out by the court in limine. The court finds some authorities to support this conclusion.

[37] In *Harun bin Taib v Khor Peng Song* [1991] 3 CLJ 2484; KC Vohrah J, in dismissing the plaintiff's claim with costs held inter alia that:

> On the other hand, bearing in mind *Alexander v Rayson* [1936] 1 KB 169 and *Napier v National Business Agency* [1951] 2 All ER 264 touching on the refusal at enforce contracts intended to mislead revenue authorities as being opposed to public policy my view is that the insertion of a false figure for the consideration was intended and calculated to mislead the stamp duty authority and result in the evasion of the payment of a higher duty; and the Court has to regard that as being opposed to public policy within the meaning of s 24(e) of the Contracts Act. And that makes the agreement void too and unenforceable.

[38] In that case, the insertion of a false figure to mislead the Stamp Duty Authority in order to avoid payment of higher stamp duty is considered as being opposed to public policy within the meaning of s 24(e) of the Contracts Act 1956. What more in the present petition?; the act of the petitioner in trying to mislead the licensing board namely the Pusat Khidmat Kontraktor according to the company 'bumiputra' satus.

[39] Section 24 of the Contracts Act 1950 particularly subsection (e) is very clear on this matter. The consideration or object of an agreement is lawful, unless (e) the court regards it as immoral or opposed to public policy.

[40] In another case, *B-Trak Sdn Bhd v Bingkal Timber Agencies Sdn Bhd* [1989] 1 MLJ 124, Abu Mansor J held that if the defendants could prove that the agreements had the effect of misleading the Revenue Department, such agreements would be unenforceable on the ground of public policy under s 24(e) of the Contracts Act 1950.

[41] Again, in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457, the Privy Council had inter alia held that:

> It is well established as a general principle that the illegality of an agreement sued upon is a matter of which the Court is obliged, once it is appraised of facts tending to support the

suggestion, to take notice ex proprio motu and even though not pleaded (see eg *Edler v Auerbach*) for clearly, no court could knowingly be party to the enforcement of an unlawful agreement.

[42] In the present petition, so long as either or both parties at the inception of the scheme have knowledge or knew that the scheme has the effect of defeating the economic policies of Malaysia, no claim or recovery (including refunds or institution under s 66 of the Contracts Act 1950) pursuant thereto would be allowed (see *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141 and *Wong Yoon Chai v Lee Ah Chin* [1981] 1 MLJ 219).

[43] In the case of *Suntoso Jacob v Kong Miau Ming* [1986] 2 MLJ 170, the Singapore High Court refused to enforce a transaction where a public authority had been misled. In that case, the plaintiff, an Indonesian national sought a declaration that the first defendant was holding shares in a company on trust for him. At the material time, there was an administrative guideline by the Registrar of Singapore Ships that a vessel could not be accepted for registration unless the corporate owner was itself owned by at least one half of its equity by Singapore citizens. The plaintiff was aware of this requirement. The plaintiff admitted that the true ownership of the shares in the company owning the vessel had not been disclosed to the registrar. In dismissing the claim, the High Court at p 172 held that:

> The plaintiff is therefore confronted with the principle stated a long time ago by Lord Mansfield: 'No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.' see *Holman v Johnson* [1775] 1 Cowper 343. A similar situation has arisen in *Palaniappa Chettiar v Arunasalam Chettiar* [1962] 28 MLJ 143. I have no doubt that the Plaintiff had practiced a deception on the Registrar of Singapore Ships. To the Plaintiff, I have to say: 'Let the said shares lie where they fall.'

[44] The Singapore Court of Appeal dismissed the appeal against the said decision of the High Court judge.

[45] Similarly, in the present petition, in assuming that the petitioner's claims that he parked his shares with the second respondent is true, because it was motivated by an intention and has the effect to deceive the licensing body as well as other parties into the company with special contracts restricted to companies with 'bumiputra' status, the petitioner's claim cannot be entertained by this court.

[46] The New Economic Policy was introduced to correct the imbalance of bumiputra participation in businesses. The petitioner's scheme is designed to mislead the government and to overcome restrictions of the New Economic Policy. The court will not lend its hand to assist the commission of an illegal act or one which is contrary to public policy. Hence, as the petition is indeed an abuse of process, the court should not allow it to proceed.

THE LAW ON STRIKING OUT

[47] There is no dearth of authorities on the principles of striking out pursuant to O 18 r 19(1) of the Rules of the High Court 1980. In *Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 37, the Supreme Court held:

A The principles upon which the Court acts in exercising its power under any of the four limbs of Order 181 rule 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (AG of *Duchy of Lancaster v L. & NW Rly Co*.)…

B

[48] Similarly, in the case of *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309, the Court of Appeal held:

C Whether a case is plain and obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success (see *Mckey & Anor v Essex Area Health Authority & Anor* [1982] 2 QB 1166

When a question of law becomes an issue, this in itself will not prevent the Court from granting the application, for as long as the Court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400). Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the Court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

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E

[49] Applying the above principles to the facts of the present petition, the court is satisfied that this is a plain and obvious case as the petitioner has no chance of success based on his own assertion of fact in the petition itself (paras 23-28). The fact is clear and undisputed. The issue of law particularly with respect to s 24(e) of the Contracts Act 1950 is unarguable and unsustainable. Therefore, on this ground above, the court allowed the respondents' application to strike out the petition as in encl 9 & 10 with costs.

F

Respondent's application to strike out the petition in encl 9 & 10 allowed with costs.

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Reported by Peter Ling

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